

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD DAVID PARR,

Defendant-Appellant.

UNPUBLISHED

November 30, 2006

No. 262202

St. Joseph Circuit Court

LC No. 03-011923-FC

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and MCL 750.520b(1)(b). He was sentenced to concurrent terms of fifteen to thirty years’ imprisonment. Defendant appeals as of right, and we reverse and remand for a new trial.

Defendant first asserts that the trial court erred in refusing to grant a mistrial when comments by several prospective jurors tainted the entire panel and caused irreversible prejudice and an unfair trial. This Court reviews a trial court’s denial of a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

“A defendant tried by jury has a right to a fair and impartial jury.” *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997); US Const, Am VI; Const 1963, art 1, § 20. “The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially.” *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Comments of potential jurors during voir dire may warrant a new trial where they are “such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment.” *People v Sowders*, 164 Mich App 36, 47; 417 NW2d 78 (1987). In order to establish that extraneous influence requires reversal, the defendant must initially prove that the jury was exposed to an extraneous influence, and that the extraneous influence created a real and substantial possibility that it could have affected the jury’s verdict. *Budzyn, supra* at 89. Generally, in proving the latter point, the defendant must “demonstrate that the extraneous

influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.*

Here, during voir dire, after the trial court informed all of the potential jurors that the case involved criminal sexual conduct with a minor, one prospective juror stated that he knew defendant. He then added, “I told my kids and other people on the street has told them to stay away from him and there and that.” Soon after these comments, another juror said that she also knew defendant and that her previous knowledge of defendant would cause her to disfavor him, if she sat on the jury. While both of these prospective jurors were excused from serving, everyone who eventually sat on defendant’s jury heard the comments.

Defendant moved for a mistrial on the ground that the jury was tainted by the prejudicial comments, and the prosecutor concurred. The court nevertheless denied the motion.

In evaluating the fairness of the trial court’s ruling on the motion for mistrial, we must closely examine the entire voir dire to determine if an impartial jury was impaneled. See *People v Jendrzewski*, 455 Mich 495, 517; 566 NW2d 530 (1997). Such a review reveals that the jury was exposed to extraneous influences regarding defendant. Further, there was a real and substantial possibility that the influences could have affected the jury’s verdict. *Budzyn, supra*.

The comments made by the two prospective jurors imparted that defendant should not be allowed near children. In light of the reason for which defendant was on trial, the comments were too prejudicial to be cured by a jury instruction, and defendant was denied his right to a fair trial by an impartial jury. A mistrial should have been granted.

Defendant’s second issue on appeal also warrants a new trial. Defendant claims error on the basis that the trial court failed to permit the jury to review requested transcripts, and completely foreclosed the jury from the possibility of doing so at a later time.

We review a trial court’s decision whether to read testimony to a jury for an abuse of discretion. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). The decision whether to allow a jury to reexamine selected testimony is left to the sound discretion of the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). The court cannot, however, simply refuse to grant a jury’s reasonable request to review certain testimony or evidence, but must exercise its discretion to assure fairness and to grant reasonable requests while refusing unreasonable requests. MCR 6.414(J)¹; *Howe, supra* at 676. A trial court may order the jury to continue deliberations without the requested review, provided that the possibility of having the testimony reread at a later time is not foreclosed. MCR 6.414(J).

In the instant case, the jury began deliberation a day after the evidence was presented. After forty minutes of deliberation, the jury asked for a copy of the testimony from the victim and two additional witnesses. The court responded:

¹ MCR 6.414(J) was formerly MCR 6.414(H), until it was renumbered effective January 1, 2006.

[L]adies and gentlemen of the jury, we had barely a full day of testimony. They were just – two of the witnesses and the complainant, and in this particular matter, it will take a considerable amount of time if we were to do a transcription, and I'm not inclined to wait another day or so to have one prepared. You should be able to remember their testimony from yesterday, and the answer to that second question would be no.

The court sent the jury back to deliberate, and it returned a verdict of guilty shortly after. The trial court did not leave open the possibility that the testimony could be reviewed at a later time. To the contrary, the trial court told the jury it should be able to remember, and answered the request with a definitive denial. The jury would not have understood that it was acceptable to request the transcripts again at a later time. Further, the testimony requested was essentially decisive to the case. There was no physical evidence presented, so the witnesses' testimony was the only evidence on which the jury could base its verdict. Accordingly, we conclude that the trial court erred in foreclosing the jury's opportunity to review testimony if, after further deliberation, it needed to do so. MCR 6.414(J); *Howe, supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Jane E. Markey